UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION *Plaintiff,* vs. MCGINN, SMITH & CO., INC. McGINN, SMITH ADVISORS, LLC, McGINN, SMITH CAPITAL HOLDINGS CORP., FIRST ADVISORY INCOME NOTES, LLC, FIRST EXCELSIOR INCOME NOTES, LLC, FIRST INDEPENDENT INCOME NOTES, LLC, THIRD ALBANY INCOME NOTES, LLC, TIMOTHY M. MCGINN, AND DAVID L. SMITH, LYNN A. SMITH, DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, GEOFFREY R. SMITH, LAUREN T. SMITH, and NANCY MCGINN, *Defendants,* LYNN A. SMITH, and NANCY MCGINN, *Relief Defendants, and* DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, *Intervenor.*	10 Civ. 00457 (GLS/DRH)

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO COMPEL THE PLAINTIFF TO ANSWER INTERROGATORIES BY DEFENDANTS TIMOTHY M. MCGINN AND DAVID L. SMITH

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Defendants Timothy M. McGinn and David L. Smith (the "Defendants"), by and through their undersigned attorneys, move to compel Plaintiff Securities and Exchange Commission ("SEC") to answer interrogatories as follows:

PRELIMINARY STATEMENT

The Court should compel the SEC to answer interrogatories identifying persons with whom it communicated at the Financial Industry Regulatory Authority ("FINRA"), the Department of Justice ("DOJ") and the Federal Bureau of Investigations ("FBI") because such information is relevant and reasonably calculated to lead to the discovery of evidence of the government's violation of Defendants' Fifth Amendment rights. Consistent with the Federal Rules of Civil Procedure ("FRCP"), the interrogatories only request the identity and contact information of persons the SEC communicated with at these respective entities regarding Messrs. McGinn and Smith and issues related to this action. The SEC failed to comply with FRCP 33 because it objected to the Defendants' interrogatories in a general and broad manner. Put otherwise, the SEC provided absolutely no specific basis of objection to the interrogatories that are the subject of this motion. For this reason alone, the SEC should be compelled to provide the information.

Defendants can only speculate that the SEC bases its objections on either the ground of relevance or privilege. Neither objection has merit. The information sought is highly relevant and reasonably calculated to lead to admissible evidence. As is set forth below, Defendants make a *prima facie* showing that there was state action by FINRA at the SEC's (and likely DOJ's) behest which violated the Defendants' Fifth Amendment rights. There is no plausible basis for the SEC to assert a privilege because there is no attorney-client relationship between or

among the SEC, DOJ, FBI and FINRA. The SEC has also failed to properly assert any qualified privilege which, when considering the equities, would militate in favor of non-disclosure in any event.

The SEC's refusal to comply with Defendants' discovery demands should not be permitted and the Defendants respectfully request that the Court compel production of the information.

FACTS

In the fall of 2008, FINRA commenced a routine examination of McGinn, Smith & Co., Inc. ("McGinn Smith"). Declaration of Martin P. Russo, Esq. ("Russo Decl.") ¶ 3, Exhibit B. That examination was assigned the number 20811752. *Id.* FINRA then visited McGinn Smith for three and a half days collecting information and examining records. *Id.* at ¶ 4, Exhibit C. On December 15, 2008, FINRA conducted an exit interview at which it informed Defendants that it would be conducting a supervisory review of the examination file and issuing an examination report. *Id.* at ¶ 5, Exhibit D.

On February 27, 2009, FINRA sent a letter to David Smith regarding the indictment of former New York State senator Joseph Bruno[1] and made a FINRA Rule 8210 request for documents and information related to the indictment. *Id.* at ¶ 6, Exhibit E. FINRA began seeking information from Defendants and, by April 2009, requested that Messrs. McGinn and Smith provide testimony in connection with FINRA's routine examination number 2008117152. *See id.* at ¶¶ 6-8, Exhibits E-G. Messrs. McGinn and Smith appeared for an on the record interview as was compelled by FINRA's rules. *Id.* at ¶¶ 7-8, Exhibits F-G. FINRA focused its inquiry on the entity McGinn Smith, issues relating to First Advisory Income Notes, LLC

[1] On or about December 7, 2009, former Senator Joseph Bruno was convicted on two of the eight counts against him – neither of which relate to allegations involving McGinn Smith. Russo Decl. at ¶ 12, Exhibit K.

("FAIN"), First Excelsior Income Notes, LLC ("FEIN"), First Independent Income Notes, LLC ("FIIN"), Third Albany Income Notes, LLC ("TAIN"), and former Senator Joseph Bruno. *Id.* At that time, FINRA did not ask questions regarding the Defendants' personal finances or the trust entities the SEC later raise in its complaint pending before this Court (the "Trusts"). *Id.*[2]

After the interviews, FINRA made several additional requests for documents and information to McGinn Smith. *Id.* at ¶ 9, Exhibit H. The firm produced the documents. *Id.* On July 2, 2009, FINRA issued an Examination Report which summarized its investigation and indicated that the examination had been completed ("We have recently completed the Sales Practice examination of your firm."). *Id.* at ¶ 10, Exhibit I. The cover letter to the report indicated that FINRA's disposition related to the examination would be conveyed under a separate cover after management's review of the written response to the Examination Report. *Id.*

On September 1, 2009, FINRA issued its Examination Disposition Letter. *Id.* at ¶ 11, Exhibit J. The letter stated that the only issue being referred to FINRA Enforcement was related to McGinn Smith's maintenance of electronic customer correspondence and internal communications. *Id.* The letter contained no reference to FINRA Enforcement of issues related to FIIN, FEIN, FAIN or TAIN because FINRA had decided to refer the matter to the SEC. The letter also announced a required compliance conference which was held on or about October 5, 2009. *Id.* Thus, by October 2009, FINRA's routine examination number 20080117152 was completed and the only open item for FINRA was potential disciplinary action for poor maintenance of correspondence.

By mid-December 2009, FINRA referred activity discovered at McGinn Smith to the SEC. *Id.* at ¶ 13, Exhibit L. Toward the end of December 2009, FINRA provided the SEC with

[2] Notably, FINRA asked Mr. McGinn about a meeting at a restaurant with former Senator Bruno and a money manager, which it could have only learned of through communications with the government. *See* Russo Decl. at 6, Exhibit E, pp. 164:18-166:7; *see also* Exhibit F, pp. 62:7-63:3.

documents obtained in the FINRA investigation. *Id.* at ¶¶ 13 – 16, 18, Exhibits L-O, Q. On January 5, 2010, the SEC issued a formal Order Directing Private Investigation and Designation of Officers to Take Testimony (the "Formal Order of Investigation"). *Id.* at ¶ 17, Exhibit P.

REDACTED *Id.*

Although authorized to investigate and take the testimony of Messrs. McGinn and Smith (as well as others), the SEC made no attempt to do so. Instead, it relied upon FINRA to carry out its investigation.

After the SEC issued the Formal Order of Investigation, FINRA began to do its bidding. During the next few months, the same FINRA team would use examination number 20080117152 to collect the information the SEC needed for its complaint in this action. *Id.* at ¶¶ 18-36, 38-40, Exhibits Q-HH, JJ-LL. None of the witnesses or recipients of FINRA Rule 8210 document requests were told that FINRA was acting for the federal government. *Id.* at ¶ 20. As a consequence, none of the witnesses were aware that they were permitted to assert their Fifth Amendment right against self-incrimination. *Id.* Indeed, FINRA actively misled the witnesses – including Defendants – by threatening them with the deprivation of their livelihood under the organizations private rules if they refused to answer any questions. *Id.* at ¶¶ 22-24, Exhibits T-V.

There is a clear pattern of coordination between the SEC and FINRA with respect to testimony of witnesses. Each time a transcript was prepared, it was immediately forwarded to the SEC for review. FINRA began by taking the testimony of McGinn Smith employee David Rees on or about January 11, 2010. *Id.* at ¶ 19, Exhibit R. As soon as the transcript was prepared, FINRA forwarded the transcript of that interview to the SEC. *Id.* at ¶ 21, Exhibit S.

In early February 2010, FINRA took testimony of David Smith for three days despite having already taken it a year prior. *Id.* at ¶¶ 22-24, Exhibits T-V. During the interviews FINRA raised out of the ordinary questions regarding Mr. Smith's income, personal bank accounts, personal estate and asset planning, and personal taxes. *See id.* FINRA also asked about the Trusts and threatened to discipline Mr. Smith if he refused to answer questions. *Id.* Notably the FINRA disciplinary action does not involve the Trusts or Mr. Smith's personal assets. *Id.* at ¶ 37, Exhibit II. The information gathered by FINRA relating to the Trusts and Mr. Smith's personal finances could only have been obtained to support the SEC's complaint in the instant action and its motions for an asset freeze and preliminary injunction. FINRA forwarded a copy of the transcript to the SEC as soon as it was prepared. *Id.* at ¶ 30, Exhibit BB.

Also in early 2010, FINRA took testimony of Timothy McGinn for two days. *Id.* at ¶¶ 25-26, Exhibits W, X. FINRA's interrogation was unusual because it asked questions about personal bank accounts, brokerage accounts, offshore accounts, and his tax accountant. *Id.* FINRA also asked Mr. McGinn about the Trusts during that interview. *Id.* As with the information obtained from Mr. Smith, this information factored greatly in the SEC's action, but play no role in the FINRA disciplinary proceeding. *Id.* at ¶ 37, Exhibit II. FINRA forwarded a copy of the transcript from Mr. McGinn's interview to the SEC as soon as it was ready. *Id.* at ¶ 30, Exhibit BB.

On or about February 12, 2010, FINRA issued another Rule 8210 request to McGinn Smith seeking documents relating to the Trusts, the Defendants' personal finances and tax returns, and due diligence files on NEI Capital (an entity mentioned in the SEC complaint only), and forwarded them to the SEC as soon as they became available. *Id.* at ¶ 27, Exhibit Y; ¶ 35, Exhibit GG. On the same day, it continued its interview of David Smith. *Id.* at ¶ 28. A copy of

that transcript and the documents requested by FINRA were forwarded to the SEC as soon as they were ready. *Id.* at ¶¶ 30 31, Exhibits BB- CC.

In mid-March, FINRA took testimony of McGinn Smith employee Brian Shea, Matthew Rogers and Patricia Sicluna. *See id.* ¶¶ 32-34, Exhibits DD-FF. As soon as the transcripts of those interviews and exhibits were ready, FINRA sent them to the SEC. *See id.* ¶¶ 36, 38-40, Exhibits HH, JJ-LL.

Eight days after FINRA provided the SEC with the last tranche of documents, the SEC filed its April 20, 2010 complaint against the Defendants and others alleging violations of the federal securities laws, and seeking an immediate freeze of the Defendants' assets (the "SEC Action").[3] Docket No. 1. Notably, the SEC openly and notoriously thanked FINRA in its press release for **"its assistance in this matter."** *See id.* ¶ 41, Exhibit MM.

On April 19 and 20, 2010, eight search warrants were issued for the offices of McGinn Smith and the homes of the Defendants. *In Re Sealed Search Warrants Issued April 19 and 20, 2010*, No. 10-M-204 (DRH), Docket No. 38, June 3, 2010. The search warrants clearly were the result of weeks if not months of coordination between the DOJ, FBI and SEC. Since this coordination overlapped with FINRA's state action, it is unclear whether FINRA was acting only for the SEC or also for the DOJ and FBI.

The Defendants served interrogatories upon the SEC pursuant to Rule 33 of the Federal Rules of Civil Procedure. Russo Decl. ¶ 42-43, Exhibits NN-OO . The first three interrogatories posed were as follows:

1. Identify each FINRA employee with whom the SEC has had communications concerning McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, or the Trusts,

[3] In or about April 5, 2010, FINRA commenced its disciplinary action against the Defendants. Russo Decl. ¶ 37, Exhibit II.

including the name, telephone number, address, email address, and title of such individuals.

2. Identify each person associated with the Department of Justice, including but not limited to persons associated with United States Attorneys' Office for the Northern District of New York with whom the SEC has had communications concerning McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, or the Trusts, including the name, telephone number, address, email address, and title of such individuals.

3. Identify each person associated with the Federal Bureau of Investigations with whom the SEC has had communications concerning McGinn Smith, Smith, McGinn, FAIN, FEIN, FIIN, TAIN, or the Trusts, including the name, telephone number, address, email address, and title of such individuals.

Id.

On October 22, 2010, the SEC provided its response to the interrogatories. *Id.* at ¶2, Exhibit A. It objected to interrogatories numbers 1, 2, and 3 in their entirety as follows based on the "General Objections and Responses set forth above." *Id.* Only two paragraphs of the SEC's "General Objections and Responses" contain a purported basis for an objection as follows:

> 2. The Commission objects to the extent that these interrogatories require information protected from disclosure by law, including but not limited to the attorney-client privilege, the law enforcement privilege, the deliberative process privilege, the attorney work product doctrine or any other applicable privilege or doctrine. The Commission with not provide such information.
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> 5. The Commission objects to the extent that these Interrogatories seek information that is not relevant to this action, or not reasonably calculated to lead to the discovery of admissible evidence.

Id.

On October 25, 2010, Defendants' counsel contacted the SEC by email and requested that it amend its responses to interrogatories to include the information requested in requests 1-3. *See id.* at ¶ 44, Exhibit PP. The SEC replied that it saw "no reason to amend the interrogatory responses." *See id.* at ¶ 45, Exhibit QQ.

On October 25, 2010, Defendant's counsel requested that the SEC's failure to answer interrogatories be added to the agenda for a pre-motion conference already scheduled with the Court pursuant to Local Rule 7.1(b)(2). *See* Docket No. 160. After conducting the requested pre-motion conference, the Court granted leave to Defendants to file the instant motion. *See* Docket No. 161.

Defendants move to compel that the SEC respond to certain interrogatories Defendants served upon it pursuant to Rule 37(a)(3)(B)(iii) of the Federal Rules of Civil Procedure. The motion should be granted because the SEC is improperly withholding information that is both relevant and reasonably calculated to lead to the discovery of admissible evidence regarding the SEC's violation of the Defendants' Fifth Amendment rights.

I. THE SEC SHOULD BE COMPELLED TO RESPOND TO THE INTERROGATORIES BECAUSE IT HAS NOT PROPERLY OBJECTED TO THE REQUESTS

The Defendants' motion to compel must be granted because the SEC failed to specifically object to the interrogatories as required by the FRCP and has waived all objections. A party objecting to an interrogatory is required by the FRCP to specifically state the reason for its objection to the particular request. Rule 33(b)(4) Federal Rules of Civil Procedure ("The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.").

It is the objecting party's burden to explain why the interrogatory is objectionable. *Perro v. Romano*, No. CV-85-4020 (ILG), 1987 WL 7563 *1 (E.D.N.Y. Feb. 9, 1987) (ordering the objecting party to answer the interrogatories at issue because they did not assert a privilege and "have not demonstrated to this court that the interrogatories are burdensome, oppressive, irrelevant, or overly broad."). General objections are not acceptable responses to interrogatories.

Kenneth v. Nationwide Mut. Fire Ins. Co., No. 03-CV-521F, 2007 WL 3533887 * 17 (W.D.N.Y. Nov. 13, 2007) (granting in part the defendant's motion to dismiss which was treated as a motion to compel and stating "Plaintiff cannot rely on the generalized objection that Nationwide's interrogatories were 'burdensome, oppressive, or overly broad.'") (quoting, *In re Priceline.com Inc. Sec. Litigation*, 233 F.R.D. 83, 85 (D. Conn. 2005); *see also White v. Beloginis*, 53 F.R.D. 480, 481 (S.D.N.Y. 1971) (holding that general objections are "universally held to be impermissible."). The "failure to make more than general objections to the interrogatories in and of itself constitutes grounds for denying . . . objections." *Perro*,1987 WL 7563 n. 1.

Here, the SEC made generalized objections to the Defendants' interrogatories 1 through 3 which request the identification of and contact information for persons the SEC spoke with at FINRA, the DOJ and the FBI about the defendants in this action and the Trusts. To all three interrogatories, the SEC responded that "The Commission objects to this Interrogatory for the reasons stated in the General Objections and Responses set forth above." Russo Decl. at ¶ 2, Exhibit A. The SEC failed to meet its burden to specifically state why the interrogatories are objectionable. The assertion of generalized objections indicates nothing more than that the SEC has no legitimate basis for objection. A cynic might posit that the SEC is attempting to sidestep the discovery of its coordination of its "investigation" with FINRA, the DOJ and the FBI in contravention of the Defendants' Fifth Amendment privilege against self incrimination. Nevertheless, the SEC's wholesale failure to meet its burden is a proper basis to compel responses to the interrogatories. Accordingly, Defendants motion should be granted.

II. THE INFORMATION SOUGHT IS RELEVANT TO THE UNITED STATES GOVERNMENT'S USE OF FINRA AS A STATE ACTOR TO VIOLATE THE FIFTH AMENDMENT RIGHTS OF THE DEFENDANTS.

The SEC should be compelled to answer the interrogatories because the information the Defendants are seeking is relevant and reasonably calculated to lead to admissible evidence of FINRA's state action. Assuming *arguendo* that the SEC is objecting on the basis of relevance (which is unclear), its objection is specious. Defendants seek the identification and contact information of persons the SEC spoke with at FINRA, the DOJ and FBI to further their discovery of evidence that a violation of their Fifth Amendment rights against self incrimination occurred at the hands of FINRA while acting for the government. Such discovery will have a substantial impact on the Defendants' ability to defend themselves in the instant case because the penalty for such a violation (should it be proven) is exclusion of the evidence improperly obtained.

The Fifth Amendment privilege against self-incrimination is a fundamental right and "marks an important advance in the development of our liberty." *Kastigar v. U.S.*, 406 U.S. 441, 445, 92 S.Ct. 1653, 1655 (1972). "It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Id.* One may invoke the privilege against self incrimination to protect oneself against any disclosure that reasonably believed could be used against oneself, or lead to evidence that could be used against oneself in a criminal prosecution. *See id.*

Generally, it has been found that FINRA is a private and not a state actor. *See generally, D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002). Accordingly, one cannot assert one's Fifth Amendment right against self incrimination when

providing testimony to FINRA. *See Braun, Gordon & Co., v. Hellmers*, 502 F.Supp. 897, 902 (S.D.N.Y. 1980). Indeed, in a FINRA proceeding, there is risk that testimony "may entail exposure to criminal liability." *See D.L.Cromwell, Inc.*, 279 F.3d at 162.

There are instances, however, where FINRA's actions may be considered state action. The Fifth Amendment restricts the conduct of not only the government, but also the conduct of a private entity which is found to be "'fairly attributable'" to the government. *Id.* at 161 (citing *Lugar v. Edmonson Oil Co.*, 457 U.S.922, 937, 102 S.Ct. 2744 (1982)). "Actions of a private entity are attributable to the State if 'there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the action of the latter may be fairly treated as that of the State itself.'" *U.S. v. Stein*, 541 F.3d 130 (2d Cir. 2008) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449 (1974)) (holding that KPMG LLP was a state actor that deprived employees' of their Sixth Amendment right to counsel). The nexus can be shown where the state has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 102 S.Ct. 2777, 2786 (1982). The nexus may also be shown where "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'" *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357, 95 S.Ct. 449, 456 (1974)). Variations of these standards have developed, but "some principles emerge." *Stein*, 541 F.3d at 147. "'A nexus of state action exists . . . when the private actor operates as a *willful participant in joint activity* with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is *entwined with governmental policies*.'" *Id.* (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 187 (2d Cir. 2005)).

Even the SEC has recognized that where a defendant raises the issue of joint activities, the defendant should be allowed to conduct discovery and to present evidence of the issue at an evidentiary hearing. *In re Application of Justin F. Ficken,* Securities Act Release No. 34-54699 (Nov. 3, 2006) (remanding NASD decision barring respondent from industry for violation of Rule 8210 where NASD refused to allow discovery regarding NASD's interaction with state and federal agencies including the SEC and DOJ) (*See* Russo Decl. ¶ 51, Exhibit WW); *see also, In the Matter of Quattrone*, Securities Exchange Act Release No. 53547 (March 24, 2006) (remanding NASD decision barring respondent from industry for Rule 8210 violation where NASD failed to provide evidentiary hearing on state actor issue involving cooperation between NASD and SEC) (*See* Russo Decl., ¶ 50, Exhibit VV).

Here, Defendants have made a sufficient showing that there likely was joint activity between FINRA's and the SEC when FINRA compelled Defendants to testify in February 2010. The established pattern of taking testimony on new subjects of interest relevant only to the SEC complaint and possibly the DOJ investigation (after the conclusion of the FINRA examination and referral to the SEC), and forwarding them to the SEC on a rolling basis just in time for the SEC to file a complaint without an investigation is too powerful to deny. The fact that the FINRA disciplinary action is more limited in scope that the instant case evidences that FINRA was a "willful participant in joint activity" with the SEC and was doing its bidding.

FINRA's investigation was completed by October 2009. The FINRA staff had referred its investigation to FINRA Enforcement, and the compliance conference with McGinn Smith had occurred. Russo Decl. ¶ 11, Exhibit J. After FINRA referred the matter to the SEC in December 2009, it basically began a new investigation (under the guise of the old one) of issues it had previously not explored – relating to the Trusts and the Defendants' personal financial

information (the latter of which is a highly unusual topic in FINRA investigations). It is clear that FINRA had no real interest in these matters because its disciplinary complaint against the Defendants includes only allegations of purported violations relating to FIIN, FEIN, FAIN and TAIN.

The SEC's complaint, on the other hand, not only contained allegations relating to FIIN, FEIN, FAIN and TAIN, but also alleged violations of the securities laws relating to the Trusts. Despite the Formal Order, Defendants are unaware of a single SEC subpoena or deposition being conducted and believe that the SEC did not conduct any investigation on its own. This is particularly troublesome in light of the fact that approximately a week after FINRA forwarded its last tranche of deposition transcripts, the SEC filed a complaint in this Court alleging fraud that took place over many years together with an emergency motion to freeze the Defendants' assets which utilized post-January 2010 information obtained through testimony and information requests by FINRA. The only plausible explanation for FINRA's continued gathering of evidence from Defendants relating to the Trusts and their personal assets is that it was doing so at the behest of the SEC.

Accordingly, there is *prima facie* evidence that FINRA was a state actor and engaging in joint activity with the SEC (and possibly others) and may have violated the Defendants' Fifth Amendment rights against self incrimination. As a result, the Court should compel the SEC to respond to Defendants' interrogatories so that Defendants may obtain discovery to support their state action claim.

III. THE PENALTY FOR THE VIOLATION OF DEFENDANTS' FIFTH AMENDMENT RIGHTS IS EXCLUSION OF THE EVIDENCE

Should the Defendants succeed in proving that FINRA was a state actor, it would be proper for the Court to suppress the evidence the SEC obtained from FINRA and upon which it relied (and possibly shared with the DOJ) to file the instant action. A court should exclude evidence which was surreptitiously obtained in a civil proceeding where the defendants were not allowed the notice and opportunity to assert their Constitutional protections. *See generally US v. Parrott*, 248 F. Supp. 199 (D.D.C. 1965) (holding that the government improperly obtained testimony of subjects in a civil SEC investigation by failing to give the proper warnings or advising of a parallel criminal proceeding and then providing that testimony to the criminal prosecution. The court further held that it would have been inclined to grant a motion to suppress evidence had the government not engaged in additional misconduct warranting a complete dismissal of the criminal indictment against the defendants). Moreover, where investigations are comingled rather than conducted in a parallel manner, the evidence obtained in violation of a defendant's Constitutional rights must be suppressed. *See US v. Scrushy*, 366 F. Supp. 1134, 1140 (N.D. Alabama 2005).

The court in the *Scrushy* case excluded testimony obtained by the SEC in a civil proceeding that was turned over to the US Attorney's Office and later used in a criminal proceeding . *See id.* There the defendant was scheduled to provide testimony to the SEC as part of its investigation. *See id.* at 1136. Two days before the deposition was supposed to take place, the US Attorney's Office directed the SEC to change location of the deposition. *See id.* at 1134. The Assistant US Attorney specifically asked the SEC not to reveal that it had become involved in the investigation and gave the SEC specific instructions relating to the scope of the deposition

inquiry. *See id.* at 1139. The court found that the SEC's investigation and the US Attorney's investigation "improperly merged" once the US Attorney conveyed its instructions to the SEC regarding the deposition. *See id.* at 1137. The court found that exclusion of the testimony obtained by the SEC was proper because the "[g]overment manipulated the simultaneous investigation for its own purposes. . . [and] the utilization of Mr. Scrushy's deposition in this case departs from the administration of justice." *See id.* at 1140.

In the instant case, the information Defendants sought in their interrogatories will aid them in adducing evidence that FINRA was a state actor and engaging in joint activity with SEC when it conducted its investigation of the Defendants. If the Defendants can prove state action, they will request that the evidence obtained by the SEC through its "comingled" investigation with FINRA be suppressed just as the defendant's testimony was suppressed in the *Scrushy* case.

IV. THE INFORMATION DEFENDANTS SEEK IS NOT PRIVILEGED

The SEC should be compelled to provide the names and contact information for all persons it spoke with at FINRA, the DOJ and FBI relating to the defendants in this case and the Trusts because no claim of privilege properly has been asserted. Even assuming *arguendo* that SEC is objecting on the basis of some unspecified privilege, it cannot enjoy the protection of any privilege enumerated in its "General Objections and Responses."

As an initial matter, the interrogatories do not seek any information that is protected by the attorney-client privilege or work-produce doctrine. There are no attorney-client relationships between the SEC and FINRA, the DOJ or the FBI. Moreover, there is nothing privileged about the names and contact information of individuals, and the Defendants are not seeking the content of any communication or document. Finally, disclosure to a third party of a party's

communications with his or her attorney eliminates whatever privilege the communication might have possessed. *See Bower v. Weisman*, 669 F.Supp. 602, 604 (S.D.N.Y. 1987) (holding that the attorney client privilege was waived where copies of documents containing attorney's notes reflecting attorney-client communications were shared with a third party). That disclosure may "effect a waiver of privilege not only as to that communication, *but also as to other communications . . . made at other times about the same subject.*" *Id.* (quoting *U.S. v. Aronoff*, 466 F. Supp. 855, 862 (S.D.N.Y. 1979) (emphasis in the original). The protection provided under the doctrine of work product is waived where a party discloses the work product in a way that it will likely be produced to the party's adversary. *See Overton v. Todman & Co., CPAS, P.C.*, No. 05 Civ. 7956(DAB), 2009 WL 3154296 *3 (S.D.N.Y. Sept. 24, 2009). Since the SEC does not have an attorney-client relationship with FINRA, the DOJ, or the FBI, the act of communicating the information to these agencies is not only not privileged, but also a waiver of the privilege that might otherwise have attached to the communication or work-product.

To the extent that the SEC claims to base its objection on either the deliberative process privilege or the investigative/law enforcement privilege, such objections also fail. The deliberative process privilege and law enforcement privileges are qualified privileges which must be specifically raised by the asserting party. *See Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341-1342 (D. C. Cir. 1984); *see also Children's First Found., Inc. v. Martinez*, 04-cv-0927, 2007 WL 4344915 *6 (N.D.N.Y. Dec. 10, 2007) ("'The privilege is a qualified one, requiring courts to balance the agency's interest in non-disclosure against the public interest in opening for scrutiny the government's decision-making process.'"(quoting, *Schiller v. City of New York*, 04-civ-7922, 2007 WL 136149 *8 (S.D.N.Y. Jan. 19, 2007))).

With respect to the investigative privilege, the party asserting it has the burden of establishing the existence of the privilege, and at the very least it must meet certain minimum standards. *Friedman* , 738 F.2d at 1341-1342 (reversing and remanding the district court's decision denying enforcement of subpoenas based on investigative privilege because the CFTC did not sufficiently meet certain prerequisites necessary to assert the privilege). Unless and until the asserting party has met its obligations in properly claiming the privilege, the demanding party's duty to demonstrate its need for disclosure has not been triggered. *Id.* Not only has the SEC failed to meet any of these minimum standards, it has also failed to properly assert the privilege since it only includes it as part of a list of generic privileges within its general objections. Moreover, even if the SEC were to properly assert the privilege, the Defendants' need for the information to support its *prima facie* state actor claim outweighs whatever protection the SEC seeks.

Likewise, the SEC has not asserted the deliberative process privilege in its objections to the interrogatories. Even if the Court accepts the SEC's assertion of the privilege, the objection should be denied. The deliberative process privilege "is intended to protect the decision-making process of governmental officials." *New York v. Salazar*, 701 F. Supp.2d 224 (N.D.N.Y. 2010). But where the government's decision-making process is itself an issue in the litigation, the privilege does not apply and discovery is permitted. *Children's First Found., Inc.,*2007 WL 4344915 at *7 (holding that the deliberative process privilege the government relied upon to withhold its documents from production did not apply because its decision making process became a central issue in the litigation).

In the instant matter, the Defendants' state action theory puts the SEC's decision making process at issue. Thus, if the SEC has actually asserted the deliberative process privilege as the

basis of its objections to the interrogatories, the privilege cannot apply. Therefore, the Court should compel the SEC to answer the interrogatories.

Finally, in the event that the SEC does assert a claim of privilege in opposition to this motion, the Defendants request that the Court grant them the right to reply because they do not have sufficient notice of the SEC's assertion to adequately respond at this time. Once the SEC makes its position apparent, the Defendants will be in a position to fully brief the privilege issues the SEC asserts. Accordingly, the Defendants respectfully request the right to reply to the SEC's opposition to the instant motion.

CONCLUSION

For the reasons set forth above, David L. Smith and Timothy M. McGinn respectfully request that the Court grant their motion in its entirety.

Dated: New York, New York
November 15, 2010

GUSRAE, KAPLAN, BRUNO & NUSBAUM PLLC

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CERTIFICATE OF SERVICE

I, Alison B. Cohen, hereby certify that on this 15th day of November 2010, I served a copy of Defendants' foregoing motion by CM/ECF upon the following:

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